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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1975
No. 74-1435

THE ENVIRONMENTAL PROTECTION AGENCY, *et al.*, *Petitioners*

v.

PEOPLE OF THE STATE OF CALIFORNIA *ex rel.* STATE WATER RESOURCES CONTROL BOARD AND STATE OF WASHINGTON, *et al.*, *Respondents*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS STATE OF WASHINGTON AND ITS DEPARTMENT OF ECOLOGY

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September, 1975

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STATE PRINTING PLANT OLYMPIA, WASHINGTON

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A state waste discharge permit program, operating as an approved part of the National Pollutant Discharge Elimination System of Section 402 of the Federal Water Pollution Control Act, applies to *all* who discharge pollutants from point sources into waters of the United States within a state, *including federal agencies* 7

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BRIEF FOR THE RESPONDENTS STATE OF WASHINGTON AND ITS DEPARTMENT OF ECOLOGY

QUESTION PRESENTED

Whether the Administrator of the Environmental Protection Agency, in approving programs submitted to him by the States of California and Washington for inclusion as a part of the National Pollutant Discharge Elimination System of Section 402 of the Federal Water Pollution Control Act

Amendments of 1972, erred in excluding federal agencies and instrumentalities from the coverage of the approved state programs.

SUMMARY OF ARGUMENT

I.

The Federal Water Pollution Control Act Amendments of 1972 (hereinafter FWPCAA) established an ambitious, expensive, many pronged attack on water pollution in our country with an ultimate goal of eliminating all pollution of waters of the United States. At the heart of the Act's program for regulation and control of point source waste discharges (as distinguished from "non-point") is a national waste discharge permit system entitled the National Pollutant Discharge Elimination System (hereinafter NPDES). This new system contains within it a governmental decision making mechanism whereby pollution control requirements, not only in terms of required treatment of wastes to be discharged but in terms of the time for accomplishment of such treatment, are established for specific discharges.

Two fundamental objectives of the new Act, accomplished through the NPDES, are: (1) all discharges of pollutants from point sources to waters of the United States shall be the subject of a permit issued pursuant to a national waste discharge permit system; and (2) within each state there shall be

only one permit issuing entity operating under the national system, either the federal government or the state, preferably the latter.

II.

The United States Environmental Protection Agency (hereinafter E.P.A. or petitioners) contends that federal agencies which discharge wastes to waters of the United States are not required to obtain permits from states operating a permit program as a part of the NPDES. We believe this position is clearly contrary to both the objectives and express wording of the Federal Water Pollution Control Act.[1] Our position is based primarily on the language of Section 313 of the FWPCAA which mandates that every federal instrumentality shall comply with federal, state, and local "requirements respecting control and abatement of pollution to the same extent as any person * * *." Relying on the normal and usual meaning of these words, the permit requirements of the NPDES are "requirements respecting control and abatement of pollution" within the meaning of the words as used in Section 313. Therefore federal agencies, who propose to discharge pollutants, must meet NPDES requirements established by operation of a state program just as all other dischargers are required.

There are various indicators within the FWP-

[1]The full text of Sections 313 and 402 of the FWPCAA are set forth in Appendices A and B hereof.

CAA which provide clear roadsigns of support for our position. First we note that federal agencies or facilities were exempted from specific portions of the FWPCAA; thus a strong inference arises that, where no express exemption exists in a regulatory program of the Act, federal facilities were intended to be included. Further we note the powers of the President to exempt federal facilities from most of the pollution control and abatement requirements described in Section 313 if he determines it to be "in the paramount interest of the United States" to do so. This power provides a relief valve from permit conditions included in a state permit which threaten national interest considerations. Thirdly, the language of Section 313, which requires federal agencies to pay "reasonable service charges", was clearly included to insure that each federal agency is empowered to pay fees to a state for processing applications filed in a state administered NPDES program. And, finally, attention is directed to those portions of section 505—the "citizens suit" section—which sets forth the strongest roadsign of all by providing that a citizen may enforce a condition of a permit issued under section 402 "including a requirement applicable by reason of section 313 * * *."

Based on the aforementioned policy objectives, and the specific wording of the Federal Water Pollution Control Act, when taken as a whole, a clear and unambiguous Congressional direction is established that federal agencies are required to obtain an

NPDES permit from a state whenever they discharge wastes within a state which has a federally approved permit progam.

III.

In light of the clarity of the legislative intent derived from the FWPCAA itself, we contend it is inappropriate to initiate the digression into legislative history suggested by petitioners. However, even assuming the necessity of such an examination, that endeavor will be fruitless for the total historical record is completely blurry and inconclusive in terms of both the Federal Water Pollution Control Act and the Clean Air Act. As to the latter act, the historical background of that act is suspect as a source for developing the meaning the the FWPCAA for the simple reason that the two acts are different in significant respects. The most important difference is, of course, that only the FWPCAA contains a national waste discharge permit program.

IV.

In conclusion, we note the contention of the E.P.A. that the interpretation it has given to the NPDES through adoption of rules implementing the system is entitled to great weight and that its interpretation should be accepted by this court unless there are "compelling reasons why it is wrong."

Although it is not readily apparent from the

brief of the petitioner, we are in basic agreement with E.P.A.'s position as to the scope of coverage of dischargers by the NPDES. The E.P.A. has concluded by formally adopted regulation that the NPDES is generally applicable to federal agencies. With this conclusion we agree. The only dispute we have with the E.P.A. is its interpretation that if a state operates a NPDES program it applies to all discharges within a state but discharges from federal facilities. E.P.A. contends the latter discharges are solely under the permit issuing authority of the E.P.A. With this, we quarrel. Indeed, in the precise sense, that is the issue to be decided in this case. The dispute is not whether federal agencies must obtain NPDES permits. All parties agree that federal agencies are required to do so. The only dispute involves a narrow legal issue, i.e., when a state submits a permit program to E.P.A. which meets all of the criteria necessary for approval as a part of the NPDES, may the E.P.A. approve the state program for application to all discharges but those of federal agencies? We believe the words of section 402 clearly compel a negative answer.

The interpretation of E.P.A. that federal agencies are subject to the NPDES is, of course, in direct conflict with the analysis of section 313 taken in its brief. The brief states the requirement of section 313 which federal agencies must comply with are "substantive" requirements of state law only. Requirements characterized by E.P.A. as "procedural," including permit systems (such as the NPDES), are thus not requirements within section 313. If this analysis is sound (and we believe it is not), the Environmental Protection Agency erred in its formally adopted regulations when it included federal agencies within the coverage of federally operated NPDES programs.

ARGUMENT

A STATE WASTE DISCHARGE PERMIT PROGRAM, OPERATING AS AN APPROVED PART OF THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM OF SECTION 402 OF THE FEDERAL WATER POLLUTION CONTROL ACT, APPLIES TO ALL WHO DISCHARGE POLLUTANTS FROM POINT SOURCES INTO WATERS OF THE UNITED STATES WITHIN A STATE, INCLUDING FEDERAL AGENCIES

I.
INTRODUCTION

A. The Federal Water Pollution Control Act Amendments of 1972—General background

On October 18, 1972, the Federal Water Pollution Control Act Amendments of 1972 became effective. Enacted as the result of an overriding of a presidential veto,[2] the new act undoubtedly provides for the most comprehensive, most expensive and most ambitious attack upon a pollution problem in the

[2]See "Message of the President of the United States" set forth in 1 *A Legislative History of the Water Pollution Control Act Amendments of 1972*, 137-139, Committee Print, 93d Cong., 1st Sess., (1973).

nation's history. By 1985, the act's first section provides, in part, that "it is the national goal that the discharge of pollutants into the navigable waters be eliminated * * *." Section 101 (a) of the FWPCAA; 33 U.S.C. (Supp. III) 1251(a).

To accomplish this goal, the Congress provided three major tools in the new act. The first is a greatly expanded and fully funded assistance program for the financing of publicly owned waste treatment facilities.[3] Section 201-212 of the FWPCAA; 33 U.S.C. (Supp. III) 1281-1292. The second involves a substantially increased emphasis on research and planning, as well as financial assistance to aid in the administration of state water pollution control programs. Title I and Sections 208 and 209 of FWPCAA; 33 U.S.C. (Supp. III) Subchapter I, 1288 and 1289.

The third tool relates to requirements respecting control and abatement of pollution through various regulatory programs. Stated simply, and in the most general of terms, the FWPCAA provides that (1) regardless of the quality of the waters to which a discharge of pollutants is proposed and (2) even though the proposed discharge would not violate any federal and state established receiving water quality standards, all discharges from point sources

[3]The "impoundment" by the Federal Executive Branch of a large portion of the $18,000,000,000 authorized for the program has hampered the effectiveness of this tool. The power of the executive branch to "impound" these funds was resolved by this Court in *Train v. City of New York*, 420 U.S. 35 (1975).

must be provided with high levels of treatment prior to discharge to navigable waters.[4] See generally Title III of the FWPCAA; 33 U.S.C. (Supp. III) 1311-1318. To insure that these treatment levels (or "effluent limitations"), together with federal and state receiving water standards and time schedules for waste treatment upgrading, are complied with, a new control and abatement requirement—the satisfying of the provisions of the National Pollutant Discharge Elimination System—was established. Section 402 of the FWPCAA; 33 U.S.C. (Supp. III) 1342.

B. The National Pollutant Discharge Elimination System

Prior to FWPCAA there was no comprehensive federal waste discharge permit program authorized by a federal statute. The operation of such permit programs were exclusively the responsibility of the various states.[5] However, with the announcement by the National Administration in 1970 of the activation of the long slumbering permit authority of

[4]The treatment requirements of the FWPCAA are called "effluent limitations." Section 301 of the FWPCAA provides that for all dischargers, other than publicly owned treatment works, not later than July 1, 1977, effluent limitations are to be achieved which represent the application of the "best practicable control technology currently available." At the same time, all publicly owned waste treatment facilities must utilize "secondary treatment" and if an industrial discharger sends its wastes through a publicly owned treatment works, certain "pretreatment standards" must be met. Not later than July 1, 1983, effluent requirements must be met which represent the "best available technology economically achievable," and for publicly owned waste treatment facilities, which represent the application of the "best practicable waste treatment technology." 33 U.S.C. (Supp. III) 1311.

[5]The State of Washington established a waste discharge permit program for private sources in 1955. Wash. Rev. Code 90.48.160 et seq.

the "Refuse Act of 1899,"[6] as a waste discharge permit program for private discharges of wastes to waters of the United States, this state monopoly was extinguished.[7] As a result of this action of the federal government, a situation was created whereby dischargers to navigable waters, in many states, were placed in the position of obtaining permits from both state and federal governments; a condition with the potential for developing wasteful, duplicative activities which placed unnecessary burdens on both public and private resources.

The NPDES was undoubtedly established to eliminate this unsatisfactory condition. 2, *A Legislative History of the Water Pollution Control Act Amendments of 1972*, 1488, Committee Print, 93d Cong., 1st Sess., (1973). By creating a "national" (rather than "federal") permit system, the Congress provided for a cooperative federal-state effort which contemplated that, whenever possible, only one permit program—a state endeaver[8]—would be in opera-

[6]33 U.S.C. 407.

[7]Presidential Executive Order Number 11574, 35 Fed. Reg. 19627.

[8]Both the legislative and executive branches of the State of Washington have accepted the challenge of operating a state permit program as a part of the NPDES. The legislature responded in early 1973 by enacting Chapter 155, Wash. Sess. Laws of 1973. Section 1 provides in pertinent part that:

> * * * the state of Washington will exercise its powers, as fully and as effectively as possible, to retain and secure high quality for all waters of the state. The state of Washington in recognition of the federal government's interest in the quality of the navigable waters of the United States, of which certain portions thereof are within the jurisdictional limits of this state, proclaims a public policy of working cooperatively with the federal government in a joint effort to extinguish the sources of water quality degradation, while at the same time preserving and vigorously exercising state powers to insure that present and future standards of water quality within the state shall be determined by the citizenry, through and by the efforts of state government, of the state of Washington. [Wash. Rev. Code 90.48.010]

Section 4 thereof states, in part, that the Washington State Department of Ecology is granted

> Complete authority to establish and administer a comprehensive state point source waste discharge or pollution discharge elimination permit program which will enable the department to qualify for full participation in any national waste discharge or pollution discharge elimination permit system and will allow the department to be the sole agency issuing permits required by such national system operating in the state of Washington. * * * [Wash. Rev. Code 90.48.260(1)]

tion in each state.[9] This approach is clearly consistent with statement of basic state responsibilities for water pollution control contained in that portion of Section 101(b) of the FWPCAA which provides that

> "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, * * *."

The issue to be decided in this case is whether federal agencies are subject to the NPDES when that system is operated by a state. In terms of Washington State, which is dotted with numerous federal facilities, must federal agencies which discharge wastes to state waters obtain a permit from the state for their federal irrigation projects, military bases, atomic energy facilities and power plants?

C. The "Supremacy" and "Plenary Powers" Clauses of the United States Constitution

As just noted, this case concerns the authority of a state to regulate federal agency activities in-

[9]Comments of Rep. Terry during House debate on H.R. 11896, March 27, 1972. *1 A Legislative History of the Water Pollution Control Act of 1972*, p. 580, Committee Print, 93d Cong., 1st Sess., (1973). See also the United States E.P.A. publication *The National Water Permit Program* 6 (June 1, 1973).

volving water pollution control. Before proceeding further, we point out that the United States has, throughout this litigation, raised the Supremacy Clause (U.S. Const., Art. VI, cl. 2) and the Plenary Powers Clause (U.S. Const., Art. I, Sec. 8, cl. 17) as constitutional bars to state regulation of federal facilities. Examples are shown in the "Brief for the Petitioners," pp. 13 and 18-20.

The State of Washington does not contend that it may regulate federal facilities absent congressional authorization. However, nothing in the United States Constitution prohibits such an authorization of regulation by Congress. As stated in *Mayo v. United States*, 319 U.S. 441, 446 (1943), "[I]t lies within Congressional power to authorize regulation * * * by the state of federal instrumentalities." Only recently this Court observed in *Evans v. Cornman*, 398 U.S. 419, 423 (1970) that "Congress has now permitted the states to extend important aspects of state control over federal areas." This is true whether the case is related to the Supremacy Clause or the Plenary Powers Clause.[10]

The State of Washington contends that the FWPCAA explicitly authorizes regulation of federal facilities by the state. In sum, this case involves issues of statutory construction; interpretation of

[10]See *United States v. Sharpnack*, 355 U.S. 286 (1958) upholding the constitutionality of the Federal Assimilatives Crimes Act of 1948 (18 U.S.C. § 13) which made state criminal laws applicable within federal enclaves (in that case, an Air Force base). See also, *Stewart & Co. v. Sadrakula*, 309 U.S. 94 (1940) applying state law to a contractor constructing a post office under contract with the federal government on federal land.

the FWPCAA. There are no constitutional issues to be resolved.

The remainder of this brief discusses the relationship of the NPDES to discharges of pollutants to navigable waters from federal facilities. The underlying issue is whether federal agencies must comply with the requirements of the NPDES for facilities which so discharge. The primary inquiry is whether a state waste discharge permit-issuing program, operating under the NPDES, applies to federal facilities that discharge to waters of the United States within a state.

II.

TAKEN AS A WHOLE THE FEDERAL WATER POLLUTION CONTROL ACT IS CLEAR; THE PERMIT SYSTEM OF THE NPDES IS APPLICABLE TO FEDERAL FACILITIES

A. The Cornerstone—Section 313

Resolution of this case involves, in large measure, the meaning of Section 313 of the FWPCAA, 33 U.S.C. (Supp. III) 1323, which reads in part as follows:

> Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants *shall comply with Federal, State,*

> *interstate, and local requirements respecting control and abatement of pollution to the same extent that any person* is subject to such requirements, including the payment of reasonable service charges. * * * [Emphasis added.]

Section 301(a) of the FWPCAA, 33 U.S.C. (Supp. III) 1311(a), prohibits any discharge of pollutants except as in compliance with Section 402, 33 U.S.C. (Supp. III) 1342. Section 402 requires an NPDES permit, which is issued by E.P.A., or, after approval of a state's program by E.P.A. pursuant to the standards of Section 402, it is issued by the state. Permits issued by a state are subject to review and approval by E.P.A. pursuant to Section 402(d).

The NPDES permit system is the heart of the FWPCAA. By this we mean that, through the operation of this system, the precisely tailored requirements for waste treatment and, most importantly, the timing of waste treatment upgrading, for specific waste discharging facilities are established.

Is the NPDES a requirement respecting the control and abatement of pollution within the meaning of Section 313?

Any attempt to answer this question must begin by using the usual or ordinary meaning of the word "requirements." Normally, at this point the inquiry will end. There are some exceptions, however, as stated in *Commissioner v. Brown*, 380 U.S. 563, 571 (1965):

> Unquestionably the courts, in interpreting a statute, have some "scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning would lead to absurd results * * * or would thwart the obvious purpose of the statute." [Citations omitted.] But it is otherwise "where no such consequences would follow and where * * * it appears to be consonant with the purposes of the Act * * *" [Citation omitted.]

The usual meaning of the word, "requirement," is something that is obligatory or demanded as a condition, a necessity.[11] Federal law demands and obligates each person desiring to discharge wastes into the waters of this country to secure an NPDES permit. It is clearly a requirement respecting control and abatement of pollution. Neither the statutory language nor ordinary use of the word, "requirements" differentiates between substantive and procedural requirements.[12] A normal or usual reading of Section 313 would thus appear to subject federal facilities

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[11] WEBSTER'S NEW WORLD DICTIONARY (College Edition, 1966) defines "requirement" as: "1. a requiring. 2. something required; something obligatory or demanded, as a condition: as, the *requirements* for college entrance. 3. something needed; a necessity; need.

[12] In *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973) the Court constructed what is now Section 311(o)(2) of the FWPCAA (33 U.S.C.A. § 1321(o)(2)), which reads:

> Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing *any requirement or liability* with respect to the discharge of oil or hazardous substance into any waters within such state. (emphasis added)

The Court faced the question of "whether the waiver of pre-emption by Congress in [Section 311(o)(2)] concerning the imposition by a State of 'any requirement or liability' is valid." 411 U.S. at 343-44. The Court answered the question in the affirmative with respect to a Florida statute which included license provisions. See 411 U.S. at 330, note 3. (Federal facilities were not involved.) Nobody had the imagination to suggest that "requirement" as used in that section did not include a state-imposed licensing requirement.

to the NPDES permit requirements of Section 402; and Section 402, without question, does not authorize withholding these facilities from the ambit of an otherwise approvable state program.

Is this an "absurd result?" There appears to be nothing absurd in treating federal facilities the same as private facilities. In fact it is not even unusual. Congress has already voluntarily subjected federal facilities and programs to various forms of state and local regulation and participation.[13]

It is a result which "would thwart the obvious purpose of the statute?" To the contrary, as noted earlier, Section 101(b) of the FWPCAA, 33 U.S.C. (Supp. III) 1251(b)) states that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of states to prevent, reduce and eliminate pollution * * *." This purpose would be furthered by a normal reading of the word, "requirements."

"Requirements respecting control and abatement of pollution" as those words are ordinarily understood, would include a permit for waste discharges necessitated by the provisions of federal and state law. Federal facilities must meet these requirements, which include the necessity of obtaining an NPDES permit. There is nothing absurd about this result, and it furthers the stated policy

[13]See, for example, the statutes and programs discussed in *United States v. Sharpnack*, 355 U.S. 286 (1958), and *New York v. O'Neill*, 359 U.S. 1 (1959).

of the Act. As implied by *Commissioner v. Brown*, *supra*, at this point statutory interpretation must stop. There is no justification for extensive journeys into an ambiguous legislative history or into arguably analogous provisions of other statutes in an attempt to avoid the literal or usual meaning of the words of Section 313.

B. Other Roadsigns of the Federal Water Pollution Control Act

There are a number of indicators within the Federal Water Pollution Control Act which support our contention that the words of Section 313, given their usual or ordinary meaning, require federal agencies to satisfy the permit obtaining requirements of the NPDES.

(1) The Wording of the "Citizen Suits" Provision—Section 505

The writers have found only one other section of the FWPCAA which clearly indicates whether the "requirements" of Section 313 were intended to include the NPDES permit requirement. This reference, however, appears to remove any doubt as to the intention of Congress.

Section 505 (33 U.S.C. (Supp. III) 1365) authorizes citizen suits. These include suits against the United States for an alleged violation of "an effluent standard or limitation under this chapter." This critical phrase is then defined in Section 505(f):

> For purposes of this section, the term "effluent standard or limitation under this chapter" means * * * (6) a permit or condition thereof issued under section 402 of this Act, which is in effect under this Act (*including a requirement applicable by reason of section 313 of this Act*). [Emphasis added.]

A more clear statement of Congressional intent could hardly be imaginable. Citizens may bring suit to enforce permits issued under Section 402; *and these include permits and conditions thereof applicable because of Section 313.* Congress therefore understood that Section 313 requires federal facilities to obtain NPDES permits pursuant to Section 402. No other interpretation of Section 505(f) is plausible.

(2) THE EXPRESS EXEMPTION OF FEDERAL ACTIVITIES FROM CERTAIN REQUIREMENTS —SECTIONS 306, 308 AND 401

We next note that if the authors of the FWPCAA had desired to exempt the Federal Government from the requirements of the NPDES, they would have done so expressly, especially in light of the broad, all inclusive, mandatory wording of Section 313. That the authors knew how to write and insert such "exempting" language is clear from the inclusion of language so stating in the *same title* of the FWPCAA that created the NPDES. We refer to the wording of Section 401(a)(6) which provides:

> No Federal agency shall be deemed to be an applicant for the purposes of this subsection.

Other examples of express exemptions in the Act

are found in Sections 306(c) and 308(c) which exempt federal facilities from certain state programs. In addition we point out that Section 402, which creates the NPDES permit program, contains no exemption of federal facilities. This alone creates a strong inference that no exemption was intended.[14]

(3) THE PAYMENT OF REASONABLE SERVICE CHARGES

Attention is next called to the last seven words of the first sentence of Section 313—"including the payment of reasonable service charges." This grant of payment power relating to satisfaction of water pollution control and abatement requirements fits comfortably into the concept that if there is a service fee or charge involved in the processing of a federal agency application for a NPDES permit (under a state operated program), there will be no concern over a federal agency's authority to make the pay-

[14]Petitioners contend that a state-operated NPDES does not apply to federal facilities because a program cannot be developed by a state which covers federal facilities and satisfies all the criteria required for approval of a state program by section 402. The two criteria which cannot be included, the Environmental Protection Agency contends, are contained in the provisions of sections 306 and 308 which exempt federal facilities from state enforcement of new source performance standards (section 306(c)), and inspection, monitoring and entry procedures (section 308(c)). This contention fails for the simple reason that the state program must include, according to section 402(b)(1) and (2), all *applicable* requirements of sections 306 and 308, among others. The fact that requirements for state enforcement of new source performance standards and state monitoring, entry and inspection procedures may not be applicable to federal facilities in no way detracts from the state's ability to insure compliance with the "applicable requirements" of the Act. Sections 306 and 308 thus do not justify the Environmental Protection Agency's failure to approve a state program applying to federal facilities. Likewise, the Environmental Protection Agency's contention in this regard does not detract from the other clear indicators in the Act evidencing a Congressional intention to cover federal facilities in state-operated NPDES programs.

ment. This, we believe, describes accurately the intention of Congress as to the inclusion of the seven words.[15]

E.P.A. contends, however, that "reasonable service charges" refer only to utility user-chargers. (Brief for the Petitioners, pp. 23-24.) The Court of Appeals discussed this contention in its opinion with this persuasive analysis:

> Respondents contend that these "reasonable service charges" refer to those for state and local sewage treatment hookups. We disagree. Although the legislative history of Section 313 is silent regarding the meaning of the "reasonable service charges" language, it seems the better interpretation is to read it as referring to charges incident to state permit programs. Even if we were to read the word "requirements" in Section 313 to mean "effluent standards and limitations," as respondents contend we should, interpreting the "reasonable service charge" language to refer to municipal waste disposal charges would create a *non sequitur*.
>
> Moreover, interpreting "reasonable service charges" to refer to charges associated with state permit programs would be in accord with the canon of statutory construction that, where language in a statute can be given two possible interpretations, that interpretation should be chosen which does not render the language

[15]Our construction of the "reasonable service charges" phrase is supported by a statement of Senator Howard Baker, a member of both the Senate Committee on Public Works and the "Conference Committee," which drafted the act. Senator Baker stated:

> "It is my recollection that the language on payment of such charges was intended to authorize Federal agencies' compliance with such requirements even if, for example, this meant that an agency had to pay a charge or fee to a State as part of a requirement that the agency obtain a State effluent permit under section 402 of the act." 120 Cong. Rec. S 16644 (Sept. 16, 1974).

> meaningless. Although a state's taxing power cannot operate within the confines of a federal enclave without the consent of the United States, *Mississippi River Fuel Corp. v. Mouton*, 390 F.2d 34, 35 (5th Cir. 1968), no serious contention has ever been made that subordinate governmental bodies must supply public utility services to federal agencies free of normal user charges. Hence, there would be no need for Congress to explicitly direct federal agencies to pay their full share of municipal sewer system costs. On the other hand, any permit program charges might be sufficiently in the nature of a tax that specific federal consent would be required before they could be certified as "properly payable" federal obligations.

(4) THE "RELIEF VALVE" POWERS OF THE PRESIDENT — SECTION 313

A fourth indicator is the power provided to the President in Section 313 to:

> * * * exempt any effluent source of any department, agency, or instrumentality in the executive branch if he determines it to be in the paramount interest of the United States to do so; except that no exemption may be granted from the requirements of sections 306 and 307 * * *[16]

With the inclusion of this provision, Congress has empowered the President with sufficient powers to protect the national interest arising from the various requirements of the Federal Water Pollution Control Act and other pollution control laws, including those developed by a state operated NPDES per-

[16]Section 306 relates to standards of treatment for new pollutant discharge sources while Section 307 pertains to effluent standards for "toxic" pollutants.

mit program and incorporated in a state NPDES permit. In a real sense, then, the Congress has considered the possibility of excluding federal agencies from state NPDES programs and concluded that a federal discharger should be relieved from such NPDES requirements upon a determination of the President.

III.

THE USE OF LEGISLATIVE HISTORY

A. In Light of the Clarity of Meaning of the Federal Water Pollution Control Act, Taken in its Entirety, It Is Inappropriate to Resort to Legislative History to Determine the Intent of Congress

A basic rule of statutory construction is that statutes are to be construed in a manner which effectuates the intent of the enacting body and that in construing a statute the first examination should be to the language of the statute. If the language and the purpose of a statute appears with reasonable certainty, there is no need to resort to other rules of construction to ascertain its meaning. *United States v. Ray*, 488 F.2d 15 (10th Cir. 1973). A closely related rule directs courts to give effect to unambiguous statute in accordance with its plain and obvious meaning. Resort to legislative history should not be used to change the meaning of clear and unequivocal statutes. *United States v. Oregon*, 366 U.S. 643 (1961).

Based upon our previous evaluation that the provisions of the Federal Water Pollution Control Act, taken together, are clear with regard to the applicability of state operated NPDES permit programs to federal facilities, it is unnecessary, indeed inappropriate, to examine legislative history.

B. Even Assuming the Appropriateness of Examining Legislative History, That History Is Too Blurry To Be of Assistance

The petitioners' brief devotes almost one-third of its argument to the proposition that the legislative history is decisive of Congressional intent. Brief for the Petitioners pp. 33-39. The United States places particular emphasis on the words "effluent limitations," "limitations," "performance standards," and "effluent standards," which in some cases appear to have been used interchangeably. From the use of these words, the United States has concluded Congress did not intend to "submit federal facilities to state procedures; all point to federal compliance with applicable substantive pollution abatement requirements." Brief for the Petitioners, p. 35.

We have examined the various Congressional reports containing the discussions of Section 313 upon which the Federal government relies so heavily. These materials are very brief and can be read in five minutes. Most importantly, contrary to the assertion of petitioners, they are of no real help. The

very materials which are quoted by E.P.A. in its opening brief, pp. 34-38, as significant are either far too ambiguous or imprecise to be relied upon to decide this case. For example, two paragraphs of the Report of the Senate Committee on Public Works accompanying S.2770 which discuss section 313 have been quoted in the Petitioners' Brief at page 34. The first paragraph reads in part:

> This section, similar to one in existing law requires that Federal facilities meet the same *effluent limitations* as private sources of pollution.

The emphasis was supplied by the petitioners. Yet in the second quoted paragraph, Section 313 is described as follows:

> "This section requires that federal facilities meet all control requirements as if they were private citizens."

The petitioners did not emphasize any of these words.

E.P.A. also quotes in its opening brief, at page 38, the following portion of the Conference Report accompanying S.2770 (now FWPCAA) as helpful to its position:

> *Senate Bill*
>
> Section 313 requires Federal facilities to meet the same effluent limitations as other sources of pollution, unless the facility is specifically exempted by the President. The President cannot exempt a Federal source from national performance standards or toxic and pretreatment standards.
>
> *House Amendment*
>
> Section 313 requires Federal facilities to meet the same requirements as private sources of pollution unless specifically exempted by the President in essentially the same manner as the Senate bill.
>
> *Conference Substitute*
>
> This section is the same as the Senate bill and the House amendment. 1 *A Legislative History of the Water Pollution Control Act Amendments of 1972*, 318, Committee Print, 93d Cong., 1st Sess., (1973)

Contrary to the views of E.P.A., we have struggled with these descriptions and submit that they are so ambiguous as to be of no help to the court.[17]

IV.

THE ENVIRONMENTAL PROTECTION AGENCY ADMINISTRATOR'S INTERPRETATION OF THE APPLICABILITY OF THE NPDES

A. The Conclusion of the Administrator That Federal Agencies Are Subject to the NPDES Is Correct

The E.P.A. raises the rule of statutory construction that the interpretation given to an ambiguous statute by those charged with its execution is entitled to great weight. *Red Lion Broadcasting Company v.*

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[17]The National Administration followed the FWPCAA closely during its journey through Congress. 1 *A Legislative History of the Water Pollution Control Act Amendments of 1972*, 143, Committee Print, 93d Cong., 1st Sess., (1973) contains a letter, dated October 11, 1972, the Administration's chief spokesman with regard to the FWPCAA, William Ruckelshaus, Administrator of the Environmental Protection Agency, wrote to the Office of Management and Budget

Federal Communications Commission, 395 U.S. 367, 381 (1969). Reliance on this rule is appropriate only when a statute is ambiguous. We, as stated earlier, contend the statute is reasonably clear on its face; therefore, the rule is inapplicable here. Likewise, the rule is usually applied when an administrative interpretation has been in effect for a significant period of time. *Merrit v. Cameron*, 137 U.S. 542, 552 (1890). The interpretive regulation provided by E.P.A., that a state operated NPDES does not apply to federal agencies, has been in effect only for a very short period. In any event, this court is not in any sense bound by administrative interpretation and this court should support E.P.A.'s interpretation only if it is supported by the statute upon which it is based. *Federal Maritime Commission v. Seatrain Lines*, 411 U.S. 726 (1973)

Most importantly, the State of Washington is in agreement with E.P.A. on a crucial, perhaps decisive, issue in this case. We agree with conclusion of E.P.A. that *the NPDES applies to federal facilities* generally.[18] E.P.A.'s administrative stance in reaching this

recommending presidential approval of the bill. Page 146 thereof contains the following discussion of Section 313 by Mr. Ruckelshaus:

> The law would be changed to require Federal facilities to comply with all Federal, State, interstate, and local requirements respecting water pollution control. The President may exempt facilities where he determines it is in the paramount interest of the United States. No exemptions are permitted with respect to toxic substances, pretreatment requirements, and new source performance requirements.

[18]At page 10 of its opening brief, E.P.A. describes its activities in the geographic area covered by the Ninth Circuit Court of Appeals. One hundred eighty-seven NPDES permits have been issued for that area by E.P.A. as of March 31, 1975 and 40 applications for permits for other federal agency discharges were being considered by E.P.A.

conclusion[19] is, quite obviously, inconsistent with the contention E.P.A. submitted to this court that the word "requirements" as used in Section 313 refers only to substantive requirements; and that procedural requirements, such as a state NPDES operated program, fall outside its scope. See Brief for the Petitioner, pp. 16, 38.

The actions of E.P.A. speak louder than their words to this court on this point. E.P.A. is correct in interpreting "requirements" to include the NPDES permit program. The meaning of the word "requirements" is constant. If "requirements" includes NPDES permits when E.P.A. is administering the program, then the same is true when the state is administering it.

B. The Only Error in the Environmental Protection Agency Interpretation of the Federal Water Pollution Control Act Was the Exclusion of Federal Agencies from State Operated NPDES Programs

The issue to be resolved in this case is narrow. The State's single dispute with E.P.A. relates to the federal agency's conclusion pertaining to the NPDES contained in the regulation of the agency which states, at 40 C.F.R. 125.2(b):

> The regulations in this part do not prescribe

[19]40 C.F.R. 125.2(a)(2), a regulation interpreting and implementing the NPDES, the E.P.A. provided:

> The regulations in this part also prescribe the *policy and procedures to be followed in connection with permits authorizing discharges into the navigable waters*, the waters of the contiguous zone, and the oceans *from any agency or instrumentality of the Federal Government*, and from any Indian activity on Indian lands. (Emphasis supplied.)

policy or procedures for the issuance of permits by States under programs approved by the Administrator pursuant to section 402(b) of this Act. *Such State programs do not cover agencies and instrumentalities of the Federal Government and Indian activities on Indian lands under the jurisdiction of the United States.* (Emphasis supplied.)

The refusal of the E.P.A. to consider federal facilities for inclusion in a permit program operated by the State of Washington is a specific application of the conclusion of 40 C.F.R. 125.2(b). The conclusion of the regulation is without statutory support.

The controlling statute is Section 402 of FWPCAA. It provides, in part:

> At any time after the promulgation of the guidelines required by subsection (h)(2) of section 304 of this Act, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not quirements which state programs must meet.]

> exist: * * * [There follows a list of re-
> (c)(1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator *shall suspend the issuance of permits under subsection (a) of this section as to those navigable waters subject to such program* unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 304(h)(2) of this Act. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines. (Emphasis supplied.)

Section 402, although lengthy, is straight forward. Simply stated it establishes a national system of permit programs. A permit program is to be administered by E.P.A. in every state except in those states whose governors submit approvable programs under section 402(b). In each state with an approvable program, the state is the sole administrator of the NPDES permit program. As noted by the emphasized words of the quoted portion of section 402, the administrator is directed "to suspend" the issuance of permits "as to those navigable waters" covered by the program.

The permit programs of NPDES operated within the various states, whether administered by a state or E.P.A., have the same general coverage. With possibly limited exceptions,[20] there are no distinctions in

[20]The only possible exceptions are contained in Sections 306 and 308 of the FWPCAA. See the discussion in Footnote 14.

state or federal NPDES permit programs because of the nature of the discharge, the nature of the discharger, or the nature of the permit program administrator. In the words of Section 402(a)(3):

> The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, *and requirements* as apply to a State permit program and permits issued thereunder under subsection (b) of this section. (Emphasis supplied.)

This language is consistent with the mandate of section 313 that federal agencies shall comply "to the same extent as a private person * * *."

Further, we note that E.P.A. cannot approve a state program for operation under the NPDES unless the program meets all of the applicable requirements of Section 402(b). Once a state program satisfies such requirements, no provision of Section 402 authorizes E.P.A. to approve only a portion of a state program and disapprove the remainder. It is an all or nothing mandate. Section 402(c)(1) provides clear direction to E.P.A. on this point. If a state program does not meet the requirements of Section 402(b) or the guidelines issued under Section 304(h)(2), E.P.A. "shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines." Implicitly E.P.A. does not have authority to approve until a program is fully approvable.

The following discussion of E.P.A. relationships

with the states under the NPDES, contained in the Report of the Senate Committee on Public Works accompanying S 2770, 2 *A Legislative History of the Water Pollution Control Act Amendments of 1972*, 1489, Committee Print, 93d Cong., 1st Sess., (1973), is instructive:

> It is expected that the States will play a major role in the administration of this program.
>
> The Committee believes that, after a transition period during which the State program and capability will be upgraded, the program should be administered by those States with programs which meet the requirements of this Act.
>
> Therefore, the bill provides that after a State submits a program which meets the criteria established by the Administrator pursuant to regulations, the Administrator shall *suspend his activity in such State under the Federal permit program.* * * * (Emphasis supplied.)

Quite clearly, the Senate Public Works Committee, the primary developer of the NPDES, contemplated that E.P.A. would withdraw completely from the permit issuing activity under the NPDES after an approved state program became operable. This, of course, is completely consistent with the express wording of section 402, emphasized on page 29 hereof; namely "the administrator shall suspend the issuance of permits * * * as to those navigable waters subject to such program. * * *"

The determination by E.P.A. to refuse to approve

portions of state programs covering discharges from federal facilities and to retain permit issuing authority for those facilities flies in the face of legislative history. More importantly, that action violates the statutory grading instructions given to E.P.A. for state submitted programs, as well as the policy in NPDES of providing for only one government operating a permit program in any state.[21]

CONCLUSION

Based on the clear meaning of the Federal Water Pollution Control Act, taken as a whole, two conclusions can be drawn which are decisive in this case:

1. Federal agencies are subject to the permit requirements of the National Pollutant Discharge Elimination System; and
2. When the Environmental Protection Agency approves a permit program submitted by a state, pursuant to Section 402(b), as a part of the National Pollutant Discharge Elimination System, all NPDES permit-issuing powers of the Environmental Protection Agency are suspended for the state, and the total responsibility for issuance of such permits, including those required for federal facilities, are vested in the state.

[21]A further indication that E.P.A.'s approval powers pertaining to a "total" program is the nature of E.P.A.'s withdrawal of approval powers contained in Section 402(c)(3). This subsection clearly provides that if E.P.A. withdraws approval of a state program, it does so by withdrawing approval of the state program in its entirety. This, of course, emphasizes the policy that only one government shall operate an NPDES permit program within a state.

Therefore, the decision below should be affirmed.

Respectfully submitted,

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APPENDIX A

SECTION 313—FEDERAL WATER POLLUTION CONTROL ACT

"SEC. 313. Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants shall comply with Federal, State, interstate, and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements, including the payment of reasonable service charges. The President may exempt any effluent source of any department, agency, or instrumentality in the executive branch from compliance with any such a requirement if he determines it to be in the paramount interest of the United States to do so; except that no exemption may be granted from the requirements of section 306 or 307 of this Act. No such exemptions shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods of not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress

all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting such exemption.

APPENDIX B

SECTION 402—FEDERAL WATER POLLUTION CONTROL ACT

"SEC. 402. (a)(1) Except as provided in sections 318 and 404 of this Act, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 301(a), upon condition that such discharge will meet either all applicable requirements under sections 301, 302, 306, 307, 308, and 403 of this Act, or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this Act.

"(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

"(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms,

conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

"(4) All permits for discharges into the navigable waters issued pursuant to section 13 of the Act of March 3, 1899, shall be deemed to be permits issued under this title, and permits issued under this title shall be deemed to be permits issued under section 13 of the Act of March 3, 1899, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this Act.

"(5) No permit for a discharge into the navigable waters shall be issued under section 13 of the Act of March 3, 1899, after the date of enactments of this title. Each application for a permit under section 13 of the Act of March 3, 1899, pending on the date of enactment of this Act shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this Act, to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on the date of enactment of this Act and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 304 (h) (2) of this Act, or the date

of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this Act. No such permit shall issue if the Administrator objects to such issuance.

"(b) At any time after the promulgation of the guidelines required by subsection (h) (2) of section 304 of this Act, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

"(1) To issue permits which—

"(A) apply, and insure compliance with,

any applicable requirements of sections 301, 302, 306, 307, and 403;

"(B) are for fixed terms not exceeding five years; and

"(C) can be terminated or modified for cause including, but not limited to, the following:

"(i) violation of any condition of the permit;

"(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

"(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

"(D) control the disposal of pollutants into wells;

"(2)(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 308 of this Act, or

"(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 308 of this Act;

"(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

"(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

"(5) To insure that any State (other than the

permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

"(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

"(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

"(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require adequate notice to the permitting agency of (A) new introductions into such work of pollutants from any source which would be a new source as defined in section 306 if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 301 if it were discharging such pollutants, or (C) a substantial

change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

"(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 204(b), 307, and 308.

"(c)(1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those navigable waters subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 304(h)(2) of this Act. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

"(2) Any State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to section 304(h)(2) of this Act.

"(3) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

"(d)(1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

"(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this section objects in writing to the issuance of such permit, or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this Act.

"(3) The Administrator may, as to any permit application, waive paragraph (2) of this subsection.

"(e) In accordance with guidelines promulgated pursuant to subsection (h)(2) of section 304 of this Act, the Administrator is authorized to waive the requirements of subsection (d) of this section at the time he approves a program pursuant to subsection (b) of this section for any category (including any class, type, or size within such category) of point sources within the State submitting such program.

"(f) The Administrator shall promulgate regulations establishing categories of point sources which he determines shall not be subject to the requirements of subsection (d) of this section in any State with a program approved pursuant to subsection (b) of this section. The Administrator may distinguish among classes, types, and sizes within any category of point sources.

"(g) Any permit issued under this section for the discharge of pollutants into the navigable waters from a vessel or other floating craft shall be subject to any applicable regulations promulgated by the Secretary of the department in which the Coast Guard is operating, establishing specifications for safe transportation, handling, carriage, storage, and stowage of pollutants.

"(h) In the event any condition of a permit for discharges from a treatment works (as defined in section 212 of this Act) which is publicly owned is violated, a State with a program approved under

subsection (b) of this section or the Administrator, where no State program is approved, may proceed in a court of competent jurisdiction to restrict or prohibit the introduction of any pollutant into such treatment works by a source not utilizing such treatment works prior to the finding that such condition was violated.

"(i) Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 309 of this Act.

"(j) A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or permit, or portion thereof, shall further be available on request for the purpose of reproduction.

"(k) Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 309 and 505, with sections 301, 302, 306, 307, and 403, except any standard imposed under section 307 for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 301, 306, or 402 of this Act, or (2) section 13 of the Act of March 3, 1899, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made

because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. For the 180-day period beginning on the date of enactment of the Federal Water Pollution Control Act Amendments of 1972, in the case of any point source discharging any pollutant or combination of pollutants immediately prior to such date of enactment which source is not subject to section 13 of the Act of March 3, 1899, the discharge by such source shall not be a violation of this Act if such a source applies for a permit for discharge pursuant to this section within such 180-day period.